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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1110

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

PETITIONER'S REPLY BRIEF.

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Counsel for respondent at page 6 of their brief in opposition observe that the parties have assumed that the Missouri law should be applied and the Courts below have attempted to apply it. Counsel contend that the Circuit Court of Appeals has correctly applied the Missouri law and that "on the undisputed facts of this case respondent is not liable in tort as a matter of Missouri law." They argue "the ultimate question is simply whether the Court below has correctly interpreted the relevant Missouri decision."

It remains clear that if, as we contend, the Circuit Court of Appeals ruled the question of defendant's negligence contrary to the applicable Missouri decisions (Pet.

B. 28-34), there is raised the important question of federal law whether the local Missouri law is applicable and governs where federal jurisdiction is based upon the fact that the defendant is a federal corporation (Pet. B. 34-40). It also remains clear that in holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, and that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, the Circuit Court of Appeals disregarded the findings of fact of the trial court supported by substantial and abundant evidence, contrary to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure and the accepted and usual course of judicial proceedings (Pet. B. 41-47). Indeed respondent in effect admits that it *undertook to repair the entire stairway* and that it was negligent in not repairing the fourth tread.

At page 4 of its brief respondent admits that its representative told Sweeney that the respondent would put the house or place in a safe and rentable condition, employed a contractor to make certain repairs, and employed King to inspect the premises as the work progressed, check the contractor, and report any other defects or unsafe conditions which he might discover.[1] Respondent thereby in effect concedes that the finding of the trial court that respondent undertook to repair the entire premises, including the basement stairway, was supported by the evidence.

1. In the performance of those duties King made five inspections; inspected the stairway to see that it was secure and safe, checked along the stringers, stood alongside the stairs, examined to see what kind of nails were holding the treads, went under the stairway to see that nails were "nailed in properly," hunted anything "unsafe" whether included in the contractor's specifications or not; it was his duty to report anything making the place unsafe "and get something done about it" (Pet. 8-10). Thus the defendant "set about" (respondent's brief, p. 7) to make the whole stairway safe.

At pages 4 and 5 of their brief counsel for respondent say, "there was no evidence that respondent specifically agreed to repair any part of the basement stairs other than the landing." By this counsel must mean that the fourth tread was not specifically mentioned. Having admitted that respondent told Sweeney that it would put the entire house or place in safe and rentable condition they certainly cannot mean to say that respondent didn't agree to repair the basement stairs, which were a part of the house.

Counsel for respondent at page 8 of their brief contend that "significance is attached (by Missouri decisions) only to what is done, not what is promised." *On the contrary*, promises or agreements of the landlord are competent evidence of the landlord's undertaking to repair. *Shaw* v. *Butterworth*, 327 Mo. 622, 628-9, 38 S. W. (2d) 57, 60. *Moreover*, the fact that respondent employed King to make inspection during the progress of the work, and not only check the contractor's compliance with the specifications under which he was working, but also to report any other defect or unsafe condition which King might discover, so that it would be repaired (Respondent's Brief p. 4, Pet. pp. 9-10), establishes an undertaking to repair the *entire stairway*, evidenced by "*what was done.*"

Respondent incorrectly agrues on page 9 of its brief that there is no Missouri decision suggesting that negligence in inspection affords any basis on imposing liability on the landlord. Under the Missouri law the repair of premises by a landlord involves the duty to exercise reasonable care to *discover and repair* defective conditions. Inspection to *discover* defective conditions is necessarily an undertaking to repair, and the negligent failure to discover and repair a defect dis-

coverable by ordinary care, constitutes actionable negligence under such undertaking. *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503.

On page 4 of its brief respondent admits that the tread in question was cracked from end to end and "not securely fastened down"; admits that King did not report the condition to respondent; admits that King knew that "a nail protruded from the tread without connecting to the stringer to which it should have been secured." [2] Respondent thereby in effect concedes that in ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread the Circuit Court of Appeals erroneously disregarded the findings of fact of the trial court, supported by substantial evidence, in violation of Rule 52(a). King was of course the agent of respondent, both as to respondent's undertaking to repair and as to its attempt to repair. The negligence of King in failing to report the defective condition was negligence of the respondent, in failing to "discover and repair" the defect of the fourth tread.

Finally counsel for respondent in effect admit that the respondent was liable under the Missouri law, when they admit, on page 7 of their brief, that under the Missouri law the landlord incurs liability "when he actually undertakes and attempts to repair, and is negligent either in making the repairs attempted to be made or in failing adequately to repair that part of the premises which he actually sets about to remedy." When respondent told Sweeney that it would put the house in safe and rentable condition (Respondent's Brief, p. 4) by performing "general and complete" repairs (Pet. pp. 8-9), and sent King out to inspect while the contractor was working, and re-

2. The evidence of negligence was much stronger than respondent's admission (Pet. pp. 10-12).

port any defect or unsafe condition, to the end that it might be repaired, although not in the contractor's specifications (Respondent's Brief, p. 4, Pet. pp. 8-10), respondent, to use the language of respondent's counsel on page 7 of their brief, "*set about to remedy*" all defects in the entire stairway which were discoverable by the exercise of ordinary care. When King failed to report the admittedly defective step and tread, although he should have known (Pet., pp. 10-12) and in fact did know (Respondent's Brief, p. 4) it was defective, respondent itself was negligent "*in failing to adequately repair*" (Respondent's Brief, p. 7) the stairway, by failing to "*discover and repair*" (*Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503) the defect in the fourth tread.

The Circuit Court of Appeals failed to follow the Missouri law and the record presents the questions for review asserted in our petition and original brief. Petitioner renews her prayer that writ of certiorari issue.

Respectfully submitted,

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